BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
	)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
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	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
	)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329
	)	

COMMENTS OF TIME WARNER TELECOM AND XO COMMUNICATIONS, INC.

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Time Warner Telecom Corporation ("TWTC") and XO Communications, Inc, ("XO") (collectively, "Joint Commenters"), by their attorneys, hereby submit these comments in response to the Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

This proceeding addresses proposed limitations on ILEC opportunities to engage in non-price anticompetitive behavior in the provision of bottleneck high-capacity end user connections. In the many circumstances in which ILEC special access is the only means of obtaining high-capacity end user connections, special access must be viewed as basically a category of unbundled network elements purchased under Sections 201 and 202 of the Act. It is just as imperative that detailed and comprehensive behavioral rules and self-enforcing penalties apply to this essential input of production for local competitors as to the inputs purchased under Section 251.

The ILECs are the dominant, indeed the only, providers of special access service in many areas and for many customers. Competitive facilities-based providers of special access such as TWTC and XO cannot efficiently build end user connections in many cases. Some end user locations are too far from the competitive carriers' networks and their needs too minimal to justify construction of facilities to the customer location. Others may be within the competitors' network footprint, but only seek to purchase a single DS1, a level of service that generally cannot be efficiently provided by a CLEC where loop construction is required. Still other customers could be efficiently served by CLEC-constructed loop facilities, but practical problems such as

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[1] *See Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, FCC 01-339 (rel. Nov. 19, 2001) ("NPRM").

lack of access to the customer's building or the customer's request that service be turned up within a short timeframe prevent competitors from relying on their own loop facilities. Moreover, all competitive special access providers face these same obstacles, so where a provider like TWTC or XO cannot construct its own high-capacity end user connections, there are generally no alternatives to the ILEC network.

Furthermore, high-capacity end user connections can *only* be purchased from ILECs as special access in a very significant number of circumstances. The current legal definition of UNEs excludes loop-transport combinations where they are not currently combined. ILECs assert (and the Commission has apparently thus far agreed) that the definition of UNEs also excludes circuits that require new construction. These are major gaps in the definition of UNEs, gaps that can only be filled by special access. There are also very serious problems associated with obtaining high-capacity loops and loop-transport combinations, even where they should be available as a legal matter. But even if the practical issues were resolved, even if the UNE national performance measurement and triennial review proceedings were somehow to remove the practical problems with obtaining high-capacity end user connections, the limitations on the legal definition of UNEs would remain. Thus, special access would still be an essential input of production for local competitors, and the Commission would still need to treat them as a category of UNEs.

Given that special access is an essential input of production, ILECs of course have the incentive to degrade the quality of that input when provided to competitors. It is imperative therefore that the Commission make that form of behavior unprofitable. This can only be accomplished through the use of detailed and comprehensive behavioral requirements, self-

enforcing penalties, and aggressive use of the Commission's forfeiture powers. The Commission must establish those requirements in this proceeding.

II. SPECIAL ACCESS IS AN ESSENTIAL INPUT FOR CLECS, AND ILECS HAVE STRONG INCENTIVES TO ENGAGE IN ANTICOMPETITIVE BEHAVIOR IN THE PROVISION OF THOSE INPUTS.

Special access circuits are usually nothing more than high-capacity loops and loop-transport combinations. Such facilities are, as both a legal and practical matter, unavailable to competitors in many situations except under the ILECs' FCC special access tariffs. Given this fact, and given that TWTC, XO, and other CLEC purchasers of special access seek to purchase those facilities in order to compete with the ILECs in their core local market, the ILECs have powerful incentives to degrade the quality of special access service they provide to CLECs.

A. Special Access Circuits Are An Essential Input Of Production For CLECs.

The Joint Commenters use special access in order to provide ubiquitous service to their customers. Although competitive providers of special access service such as TWTC and XO build connections to customer locations whenever possible, in some cases this is not efficient or practical. Where this is the case, CLECs generally have no choice but to purchase special access from the ILECs.

1. Special Access Is Necessary For CLECs To Provide Complete Service Offerings Where Construction Of Facilities Is Impractical.

The business experience of the Joint Commenters illustrates that even a competitor that prefers to construct its own loop facilities is still critically dependent on ILEC special access to serve business customers. First, unlike the ILECs, TWTC and XO lack the economies of scale in many cases to make construction an efficient option. For example, some customers seek products that, by themselves, do not generate enough revenue to justify building loop facilities to

the buildings in which the customers are located. This occurs, for example, when an occupant of a small building located in a suburban area that the Joint Commenters' networks do not reach wants to purchase only a T-1 connection. Other customers, such as banks, with multiple locations in a particular city may want to buy all of their telecommunications services from the same source, but one or more of their business locations may be too far from the Joint Commenters' transport network to justify constructing loop facilities.[2] Where there is an insufficient volume of traffic on the circuit to justify the cost of building the facility, the Joint Commenters must rely on the ILEC to reach the end user.[3] In this regard, it is important to emphasize that the costs incurred by CLECs to build to the customer constitute new investment. To incur such costs, a firm must have a high level of assurance that there will be significant demand for the products delivered over the capitalized facilities. This is simply not the case in many instances. In contrast, the ILECs have generally already sunk the costs necessary to serve the customers in question.

Second, even where it is economically feasible to construct loop facilities, the Joint Commenters often cannot obtain access to the end user's building when the building is already connected to the ILEC's network. As the Commission has recognized, landlords often impose unreasonable demands and excessive delays on competitors' efforts to serve tenants in particular

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[2] *See* Reply Comments of Time Warner Telecom, *Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996, Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport Competitive Local Exchange Carriers*, CC Docket No. 96-98, at 2 (filed June 25, 2001) ("TWTC Reply to Joint Petition").

[3] *See* AT&T Corp. Petition for Rulemaking to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding the Provision of Interstate Special Access Services, RM 10329, at 12 (filed Oct. 30, 2001) (stating that "[i]n most cases, it is not feasible or economical for competitors to build facilities directly to the end user's premises.") ("AT&T Petition for Rulemaking").

buildings.[4] This makes it difficult for TWTC, XO or any CLEC to efficiently serve customers in such buildings. For example, AT&T reports that it has been able to obtain access to "only a fraction of a percent of all commercial buildings using non-ILEC facilities and, of those, AT&T can obtain unrestricted building access using its own facilities in a tiny fraction."[5] Moreover, when a customer has an urgent need for service, CLECs may not have adequate time to negotiate access to an entire building, and thus either the customer does not receive immediate service or the CLEC must deploy only "fiber-to-floor" access.[6] This means that only the ILEC has unrestricted access to all the end users in the building, and CLECs are required to inefficiently repeat the deployment process when adding subsequent customers. This not only limits a CLEC's ability to serve customers in the building, but it also effectively limits an end user's choice of service providers.

Third, CLECs must rely on special access where a particular customer needs service to be provided before construction can be completed. The construction of new network facilities often requires negotiation of rights-of-way and can be a very time consuming process, taking months and sometimes years to complete.[7] Most customers are unwilling to wait so long to obtain

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[4] *See Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶¶ 17-24 (2000). Several other CLECs also report that competitive facilities are simply not available to CLECs in most buildings. *See e.g.*, WorldCom *Ex Parte* Presentation, CC Docket No. 01-321, at 3 (filed Nov. 21, 2001) ("WorldCom *Ex Parte*").

[5] Reply Comments of AT&T Corp., Exhibit C, Declaration of A. Fea and W. J. Taggart, III, CC Docket No. 96-98, ¶ 30 (filed Apr. 30, 2001) ("Fea/Taggart Declaration"); *see also* XO Communications, *Ex Parte* Presentation, CC Docket No. 96-98, at 5 (filed Aug. 24, 2001) (noting that "[w]hile intercity and intracity fiber alternatives are available in many metro areas, often only the ILEC has facilities deployed to a particular building.") ("XO *Ex Parte*").

[6] *See* Fea/Taggart Declaration ¶ 16. "Fiber-to-floor" means that the CLEC is permitted to run fiber only to the floor in the building where a particular customer is located, not to the entire building. *See id.* ¶ 19.

[7] *See id.* ¶ 9 (noting that new network construction often involves "cooperation from the local authorities, other carriers and building owners (for loop access to the building), and can take months, and even years to complete.").

service. When faced with such significant construction delays, many CLECs must purchase special access from another facilities provider, usually the ILEC, in order to provide service in a timely manner. Otherwise, those customers who need service in a short time frame are likely to turn to the service providers with existing facilities that are available and can be used to provide service immediately -- the ILECs.

2. ILECs Are The Dominant, In Many Cases The Only, Providers Of Special Access.

As the Joint Commenters have demonstrated, the ILECs continue to be the dominant providers in the special access market.[8] Evidence of the ILECs' market power has been submitted by numerous CLECs and reinforced by the analysis and conclusions of several state commissions (including the New York Public Service Commission ("NYPSC")), this Commission, and the Circuit Court of Appeals for the District of Columbia. This data and these opinions confirm that, even in the most competitive markets -- including those where the ILECs have been granted Phase II pricing flexibility -- CLECs are still dependent upon the ILECs for the provision of special access facilities.

State commissions, such as the NYPSC, agree that the ILECs remain the dominant providers of special access services. In a recent decision, the NYPSC found that "Verizon

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Even where a competitor is able to clear the entry barriers described herein, it is subject to certain systemic competition disadvantages. *See, e.g.*, Comments of the Association for Local Telecommunications Services, *Promotion of Competitive Networks in Local Telecommunications (Rights-of-Way Notice of Inquiry)*, WT Docket No. 99-217, at 10-17 (filed Oct. 12, 1999) (describing various discriminatory municipal regulations); Comments of MCI WorldCom, Inc., *Promotion of Competitive Networks in Local Telecommunications (Rights-of-Way Notice of Inquiry)*, WT Docket No. 99-217, at 2-4 (filed Oct. 12, 1999) (describing how many state and local governments discriminate against CLECs); Comments of Cablevision Lightpath, Inc. and NEXTLINK Communications, Inc., *Promotion of Competitive Networks in Local Telecommunications (Rights-of-Way Notice of Inquiry)*, WT Docket No. 99-217, at 16-23 (filed Oct. 12, 1999) (describing how local ordinances that impose rights-of-way obligations only on CLECs violate Section 253 of the Act).

[8] *See* Time Warner Telecom, *Ex Parte* Letter, CC Docket Nos. 96-98, 96-262 (filed Sept. 28, 2001); Time Warner Telecom, *Ex Parte* Letter (filed Dec. 4, 2001); XO *Ex Parte*.

dwarfs its competitors" in the special access services market in New York.[9] The data shows that in New York City (LATA 132), Verizon has 8,311 miles of fiber, whereas most competing carriers have a few hundred miles of fiber in the LATA. Verizon has 7,364 buildings on its fiber network, compared to less than 1,000 for CLECs. *See NYPCS Order* at 7. Of the over 220,000 buildings in New York City that are mixed use, commercial, industrial, or public institutions, CLECs have access to fewer than one-half of one percent (0.4 percent). *See id.* at 7-8. The ILEC is the sole provider for the remaining 99.6 percent. *See id*; *see also* WorldCom *Ex Parte* at 5.

These enormous disparities exist despite the fact that competition is more fully developed in LATA 132 than anywhere else in the state (or indeed, anywhere else in the nation). *See NYPSC Order* at 7; WorldCom *Ex Parte* at 4. In other parts of New York City and the rest of the state, it is substantially more difficult and costly for CLECs to construct their own facilities.[10] Thus, CLECs are forced "to rely on [the ILECs'] ubiquitous local loop facilities" to provide service to a very high percentage of end users outside of the city. *NYPSC Order* at 7. Additionally, the NYPSC reports that it continues to receive numerous complaints from consumers regarding delays in installation of high speed data lines where Verizon is both the retail and wholesale provider. *Id.* at 8. The NYPSC concluded that the market competition data,

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[9] State of New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case 00-C-2051, Case 92-C-0665, Opinion No. 01-1, at 7 (rel. June 15, 2001) ("*NYPSC Order*").

[10] *See NYPSC Order* at 7 (noting that in other parts of New York City and the rest of the state, it is much more difficult for CLECs to serve customers using their own facilities because customers are more dispersed).

combined with the consumer complaints, demonstrate that Verizon possesses market power over special access services in New York. *Id.* at 9.[11]

Similarly, numerous CLECs have demonstrated that they are dependent on the ILECs for last mile connections to the end user. In a recent *ex parte* presentation, WorldCom indicated that facilities-based CLECs remain "critically dependent on special access service provided by incumbent LECs to interconnect their networks and offer data, IP and other high bandwidth services." WorldCom *Ex Parte* at 1. Even though CLECs have invested billions of dollars in loops and transport facilities, the ILECs' facilities "remain the only means of connecting the vast majority of buildings." *Id.* WorldCom reports that in the most competitive MSAs, CLECs serve 13 percent of the buildings, while the ILECs serve the remaining 87 percent. *Id.* at 4. AT&T has also explained that it depends significantly on the ILECs for circuits connecting end user locations. AT&T Petition for Rulemaking at 14-15.

Other CLECs have also confirmed that the ILECs continue to dominate the market for special access. As XO reported in August 2001, access to special access facilities "is critical for continued growth and development of local competition," and "it continues to remain highly dependent on ILEC 'last mile' bottleneck facilities to serve end user customers." XO *Ex Parte* at 4. ALTS further confirms that "[f]or loop access, ILECs are still the only game in town."[12] CompTel recently established a task force to investigate complaints regarding the declining

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[11] It is important to point out that, although the NYPSC has imposed performance regulations on CLEC provision of special access, it would be inappropriate and contrary to well-established FCC precedent to impose performance rules on CLECs at the federal level. *See* Section IV *infra* (describing FCC precedent and policy).

[12] Association for Local Telecommunications Services, Petition for Declaratory Ruling: Broadband Loop Provisioning, CC Docket Nos. 98-147, 96-98, 98-141, DA 00-891, at 7 (filed May 17, 2000).

service quality of special access that CLECs are receiving from ILECs.[13] This group consists of large users of ILEC special access services, all of whom are "critically dependent on ILEC-provided special access for a substantial portion of their special access needs."[14] Collectively, this empirical and anecdotal data confirms that the ILECs continue to dominate the market for special access in a large number of areas.

Nor have the ILECs been able to demonstrate that special access is competitive, even under the minimal standards set forth in the *Pricing Flexibility Order*. Since the pricing flexibility regime was established, the ILECs have received Phase II pricing flexibility for channel terminations in fewer than 15 percent of the MSAs nationwide. When one considers special access more broadly (*i.e.*, not including channel terminations), the ILECs have met the triggers for Phase II relief in only one-third of the MSAs nationwide. Of course, even in those MSAs where Phase II flexibility has been granted, the ILEC is the sole provider of special access channel terminations for many point to point routes. The Commission recognized as much in the *Pricing Flexibility Order*. There it concluded that, even where an ILEC has received Phase II relief, it may still charge "an unreasonably high rate for access to an area that lacks a competitive alternative."[15] Indeed, ILECs are required to maintain their existing tariffed rates to preclude them from "abusing their *market power* by charging dramatically higher rates to customers that

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[13] *See* CompTel, *Ex Parte* Presentation, CC Docket No. 96-98, at 1 (filed Aug. 20, 2001) ("CompTel *Ex Parte*"). The task force has not yet issued any findings regarding the declining service quality of interstate special access. *See also* NRPM ¶ 14 and materials cited therein.

[14] CompTel *Ex Pa*rte at 1 n.1. The task force consists of AT&T, Broadwing, Cable & Wireless, El Paso Global Networks, Enron, Focal Communications, Global Crossing, Level 3, and WorldCom.

[15] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 144 (1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("*Pricing Flexibility Order*").

lack competitive alternatives." *Pricing Flexibility Order* ¶ 79 (emphasis added). For this reason, the Commission has refused to deem ILECs non-dominant in the provision of special access service, even after Phase II relief has been granted. *Id.* ¶ 151.

The Commission's brief in the appeal of the *Pricing Flexibility Order* further confirms that ILECs are the dominant providers of special access. There the Commission was careful to note that the investment in collocation required by both Phase I and Phase II is insufficient by itself to justify eliminating safeguards designed to prevent unreasonably high rates (and, similarly, unreasonably poor service quality). Thus, the Commission explained that it "took steps to protect consumers under the relaxed Phase II regime."[16] Indeed, a central theme of the Commission's defense of the *Pricing Flexibility Order* on appeal was that, even in Phase II, "the Commission did not deregulate the ILECs but in fact retained tariffing and other requirements to restrain abuse of market power." *Id.* at 29.

The court of appeals agreed with the Commission, finding that "the *Pricing Flexibility Order* expressly does 'not grant incumbent LECs all the regulatory relief … afford[ed] to non-dominant carriers."[17] One of the central reasons that the court upheld the competitive triggers in the *Pricing Flexibility Order* is that the Commission retained dominant carrier regulation of ILECs after Phase II relief is granted. Thus, far from recognizing that special access is competitive, the Commission's order is premised upon a finding that the ILECs continue to be the dominant providers of special access.

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16 Brief for FCC at 27, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("FCC Brief").

17 *WorldCom, Inc. v. FCC*, 238 F.3d 449, 460 (D.C. Cir. 2001) (citing *Pricing Flexibility Order* ¶ 151).

3. Special Access Is The Only Practical Alternative For CLECs Where They Cannot Construct Their Own Facilities; UNEs Are Not An Option.

Nor are UNEs a viable alternative to special access. This is true for many reasons, the most fundamental of which is that the very legal definition of UNEs makes them unavailable in many, perhaps most, situations in which the Joint Commenters must buy wholesale end user connections. First, under current law, ILECs are not required to combine elements that are not currently combined.[18] Those restrictions do not apply to special access. There is simply no other way for a CLEC to obtain a new loop-transport combination except by ordering special access. Yet many of the end user connections for which the Joint Commenters must rely upon ILEC facilities (*i.e.*, those locations that are far from the CLECs' network footprints) require interoffice transport.

Second, the ILECs contend that, under existing law, they are not required to construct new facilities for UNEs and are not required to combine new UNEs for CLECs.[19] Where CLECs cannot rely on their own loop facilities, however, new construction is often needed. The FCC has, at least for now, apparently acquiesced in the ILECs' construction of their obligation (or lack thereof) to construct UNEs.[20]

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[18] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 813 (8th Cir. 2000), *cert. granted sub nom., Verizon Communications v. FCC*, 121 S. Ct. 877 (2001) (finding that Congress determined that it is the CLEC, not the ILEC, that is responsible for combining previously uncombined network elements).

[19] *See, e.g., Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶ 91 n.314 (2001) (noting that Verizon argues that it is not required to construct new UNEs for CLECs where such facilities have not already been constructed for Verizon's use).

[20] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, FCC 01-361, ¶ 23 n.68 (rel. Dec. 20, 2001) (noting that the Commission has not required ILECs to construct new facilities that the ILEC has not

Moreover, the ILECs have attempted to stretch the meaning of "new construction" to justify rejecting UNE orders that require nothing more than the installation of a line card or other minor electronics. As XO has explained, Verizon has adopted this tactic as a means of forcing CLECs to order special access *in lieu* of UNEs. Not only is this practice unlawful (even under the current definition of UNEs), but it also allows Verizon to avoid application of any performance rules or penalties since no such rules and penalties apply to special access.[21]

Third, even if available as a legal matter, numerous practical problems with obtaining high-capacity unbundled loops and loop-transport combinations remain. For example, those carriers that have gone through the process of ordering a special access circuit (thus establishing an "existing" combination in the ILEC network) and then attempted to convert to a loop-transport combination have encountered seemingly endless obstacles to conversion. Specifically, as XO has explained, the ILECs are "intransigent" in implementing the Commission's EELs requirements. XO *Ex Parte* at 10. When requesting EELs conversion, XO has experienced endless negotiations, delayed conversion requests, threats from the ILECs to impose additional charges (*e.g.*, special access surcharges), and long provisioning intervals. *See id.* In addition to requiring CLECs to submit and process two orders for each circuit, most special access services are subject to early termination penalties. Many CLECs have faced "prohibitive penalties" to convert a historical base of special access to UNEs. *See id.* Alternatively, if a competitor

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deployed for its own use) (citing *Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 324 (1999)).

[21] *See* Comments of XO Communications, Inc., *Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347, at 15-17 (filed Jan. 14, 2002).

decides to buy special access on a month-to-month, circuit-by-circuit basis in the hopes of converting the circuits to UNEs, it will incur significantly increased costs in a different form, since ILEC prices for special access purchased in that way are usually very high. Reasonable special access prices can generally only be obtained from ILECs in exchange for volume or term commitments.

Most ILECs also have "different ordering arrangements that competitors must use depending on whether the high capacity circuits are ordered out of a tariff or an interconnection agreement."[22] Thus, for example, if TWTC were to begin using UNEs, it would have to develop and maintain a separate, and largely duplicative, back-office system for local service requests. Nor would TWTC be able to eliminate its ASR systems. Instead, it would have to continue to maintain those systems for the many instances in which UNEs are unavailable.

Finally, the ILECs prohibit so-called commingling or mixing access services and UNEs on the same facilities to serve an end user customer. The commingling restriction denies CLECs the use of an efficient network architecture because it significantly hinders their ability to achieve reasonable economies of scale when they cannot build facilities. *See* Fea/Taggart Declaration ¶¶ 38-39. As AT&T explained in its April 2001 Reply Comments, the commingling restriction essentially requires CLECs to "configure their networks in a manner that is contrary to the best engineering practices and … serves only to increase CLEC unit costs vis-à-vis the ILEC." *Id.* ¶ 40. This ban on commingling forces CLECs that want to use UNEs in conjunction

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[22] PAP Workshop Response Testimony of Tim Kagele on Behalf of Time Warner Telecom of Washington LLC, WUTC Docket Nos. UT-003022, UT-003040, at 5 (Jul. 27, 2001); *see also* Testimony of Tim Kagele on Behalf of Time Warner Telecom of the Mid-South, L.P., TRA Docket No. 01-00193, at 3 (Jul. 16, 2001); Testimony of Tim Kagele on Behalf of Time Warner Telecom Ohio, L.P., Case No. 00-942-TP-001, at 3 (Jul. 2001); Time Warner Telecom of Indiana, L.P.'s Statement of Disputed Issues, Cause No. 41657, at 11 (Jul. 2001).

with access services to instead build "parallel and inefficient networks within the existing ILEC network."[23]

B. ILECs Have Strong Incentives To Degrade The Quality Of Special Access Provided To Competitors Such As The Joint Commenters.

As the Commission has recently recognized in the Broadband NPRM, dominant firms have the incentive to raise their rivals' costs (and thereby force them to restrict output).[24] By raising its rivals' costs, dominant firms like the ILECs in the special access market can keep prices well above cost without losing market share. This can be achieved in two ways. First, an ILEC can raise the price that its competitor pays for an input. Dominant firms generally prefer this approach, since it allows them to make money while at the same time limiting their competitors' output. But given that the current rules place at least some constraints on ILECs' ability to raise special access prices (even under Phase II pricing flexibility), the ILECs are forced to look to the second basic strategy for raising rivals' costs – unreasonable and discriminatory service quality.

Rather than viewing special access purchasers as "customers," ILECs now view CLECs and IXCs as existing and/or potential competitors for local market and toll revenues. The

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[23] *Id.* ¶ 41. In fact, AT&T also notes that the ILECs actively encourage CLECs to use special access services rather than UNEs in large part because special access prices generate more revenue for ILECs than UNE prices. *See also* Comments of WorldCom, Petition of ITC^DeltaCom Communications Inc. for Waiver of Supplemental Order Clarification, CC Docket No. 96-98, at 2,3 (filed Sept. 18, 2001) (stating that the commingling prohibition requires carriers "to operate segregated and redundant network facilities," which create lower utilization and higher costs for CLECs, and that the ILECs "actively encourage" CLECs to use special access *in lieu* of UNEs); XO *Ex Parte* at 11 (stating that "ILECs' insistence that UNE and special access circuits not be commingled increases CLECs' cost and causes inefficient network design").

[24] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360, ¶ 29 (rel. Dec. 20, 2001) (stating that "an incumbent LEC might improperly exercise its existing market power through cross-subsidization, raising rivals costs, or improper discrimination.") (citations omitted).

Commission has recognized as much in prior orders.[25] As the BOCs gain approval to enter the in-region interLATA market in more states, these incentives will only worsen.[26] Until facilities-based competitors for special access services are able to offer a meaningful alternative to the ILECs, it is critical that performance measurements be adopted to deter these anticompetitive incentives.

Moreover, this is especially the case with regard to ILECs with large service areas such as SBC and Verizon. As the Commission has found, the larger an ILEC's network footprint, the greater its incentive is to engage in anticompetitive behavior.[27] This is because a larger network footprint allows the ILEC to capture a greater share of the benefits of such behavior. For example, if an ILEC degrades the quality of a competitor's special access in one part of its service territory, that competitor may be disinclined to enter wherever the ILEC operates. The larger the ILEC's territory, the greater the benefit the ILEC gains from the CLEC's decision not to compete.

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[25] *See Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 107 (1999), *vacated on other grounds, Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("[ILECs], which are both competitors and suppliers to new entrants, have strong economic incentive to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act.") (citation omitted) ("*SBC/Ameritech Order*").

[26] Marius Schwartz, The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets, 18 *Journal of Regulatory Economics* 247, at 265-66 (Nov. 2000) ("Schwartz Paper").

[27] *See SBC/Ameritech Order* ¶ 60 (observing that the merger "would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. . . . The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against [competing] carriers."); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 96 (2000) (concluding that "the increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services.") (citation omitted) ("*Bell Atlantic/GTE Order*").

Nor does the Section 271 process impact special access service quality. The FCC has expressly found that special access service is not covered by the competitive checklist.[28] Thus, the ILECs' incentive to discriminate in the provision of special access is very substantial and increasing.

III. IN ORDER TO ESTABLISH EFFECTIVE SAFEGUARDS AGAINST ILEC ANTICOMPETITIVE PRACTICES IN THE PROVISION OF SPECIAL ACCESS, THE FCC MUST ADOPT A LIMITED NUMBER OF PERFORMANCE RULES, WITH AUTOMATIC PENALTIES FOR FAILURE TO MEET THOSE RULES.

The only appropriate regulatory means to address the ILECs' incentive to degrade the quality of service provided to their competitors is to adopt detailed and comprehensive performance measurements, standards, and reporting requirements (collectively, "performance rules"), as well self-enforcing penalties applicable where those requirements have not been met.[29] This approach has been repeatedly endorsed by the Commission in the context of unbundled network elements and interconnection. There is every reason to apply it to special access.

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[28] *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 340 (1999), *aff'd sub. nom., AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (finding that "[w]e cannot accept the assertion by a number of these parties that the provision of special access should be considered for purposes of determining checklist compliance.") (citation omitted) ("*New York Order*"); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 335 (2000) (stating that "we do not consider the provision of special access services pursuant to a tariff for purposes of determining checklist compliance.") (citation omitted) ("*Texas Order*").

[29] As used herein, the terms "performance measurements," "standards," and "reporting requirements" all have the meaning attributed to them in the NPRM. *See* NPRM ¶ 1 and n.1.

A. Performance Measurements Deter Anticompetitive Conduct.

As the Commission has recognized, performance rules can deter potential anticompetitive behavior and "enable competitors, as well as the Commission, to detect any potential violations."[30] In order to be effective, performance rules must provide a means of detecting, proving, and deterring abuses. *See* Schwartz Paper at 267-68. As one industry expert has explained:

> Assuring equal access to [ILEC] local networks -- for both long-distance carriers and local competitors -- requires policing against sins of commission and of omission: a[n ILEC] might try to degrade established access arrangements, or to withhold its cooperation in establishing and properly pricing new arrangements. It is difficult for regulators to eliminate entirely even sins of commission -- the degradation of existing arrangements. Nevertheless, once arrangements are in place and there is some track record against which to benchmark "good behavior," preventing the degradation of such access becomes much more manageable.

Id. at 268 (citation omitted).

A public record of obligations and oversight, such as performance rules and self-executing penalties, is the best mechanism to increase the likelihood that ILECs will comply with the Act's requirements. Elsewhere, the Commission has relied on precisely this type of reporting to provide the proper incentives for superior service quality and deter anticompetitive

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[30] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 321 (1996).

action.[31] For example, within the context of the SBC/Ameritech merger, the Commission relied on the company's corporate compliance program to deter potential misconduct.[32]

The program also required SBC/Ameritech to publicly report key service quality performance measurements, including installation and repair performance, facility outages, and consumer complaints. *SBC/Ameritech Order* ¶ 403. In finding that these reports benefited the public interest, the Commission stated:

> The Carrier-to-Carrier Performance Plan also partially alleviates the Applicants' increased incentive and ability to discriminate against rivals following the merger. By requiring the merged firm to report results of 20 performance measures, and achieve the agreed-upon standard or voluntarily make incentive payments, the plan provides heightened incentive for the company not to discriminate in ways that would be detected through the measures. Competing carriers operating in or contemplating entry into SBC/Ameritech territory will have an increased measure of confidence that the company will not engage in discrimination that would be detected through such measures. If the results reveal unequal treatment, the voluntary payment scheme, as NorthPoint notes, will "create a direct economic incentive for SBC/Ameritech to cure performance problems quickly."

Id. ¶ 432 (citation omitted). Thus, the Commission concluded, "by providing consumers and states with information about SBC/Ameritech's service quality, th[e reporting] condition will, at a minimum, deter any potential service quality degradation and motivate

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[31] *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 334 (1990), *aff'd, Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) (recognizing that price cap regulation may cause LECs to increase their profits by lowering service quality. In order to "ensure continued high quality service to ratepayers," the Commission significantly expanded the performance reporting requirements) ("*LEC Price Cap Order*").

[32] *See SBC/Ameritech Order* ¶ 408 (the compliance program would "identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance.") (citation omitted).

the merged firm to improve its service quality where possible." *Id.* ¶ 403 (citation omitted).[33]

Similarly, within the Section 271 context, the Commission has placed great reliance on the power of performance reporting and oversight, as embodied in self-executing performance assurance plans.[34] Because these plans allow competitors to detect service degradation and sanction poor performance, the Commission has concluded that they would help ensure post-entry compliance.[35] Just as public reporting and oversight of performance rules and penalties are a critical means of ensuring nondiscriminatory provisioning and repair of local services, they are equally necessary to ensure nondiscriminatory and reasonable provisioning and repair for special access services.

Performance reporting requirements also facilitate benchmarking, which helps detect unlawful conduct. The Commission and state regulators have long recognized that comparative analyses are critical in the telecommunications market, where competitors often rely on the incumbents' facilities to offer service. *SBC/Ameritech Order* ¶ 140. The federal courts have also recognized the value of benchmarking as a way to detect discrimination: "federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements . . . and in comparing installation and maintenance practices for customer premises

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[33] *See also id.* ¶ 422 ("the Carrier-to-Carrier Performance Plan will provide competing carriers with additional protections by strengthening SBC/Ameritech's incentive to provide quality of service at least equivalent to the merged firm's retail operations or a benchmark standard."); *id.* ¶ 428 ("state-by-state service quality reports . . . will facilitate comparative practices analysis by providing additional data for this Commission and state commissions in carrying out their statutory responsibilities and in detecting potential violations of the Communications Act."); *Bell Atlantic/GTE Order* ¶ 328 ("providing consumers and states with information about Bell Atlantic/GTE's service quality . . . will, at a minimum, deter any potential service quality degradation and motivate the merged firm to improve its service quality where possible") (citation omitted).

[34] *See, e.g., Texas Order* ¶¶ 423-427; *New York Order* ¶¶ 433-443.

[35] *See, e.g., New York Order* ¶¶ 433, 438, 440; *Texas Order* ¶¶ 425-426.

equipment."[36] In the past, even the RBOCs touted the benefits of benchmarking as a means of decreasing regulation.[37] Adoption of the performance reporting requirements proposed by the Joint Commenters will deter anticompetitive behavior, ensure the continued viability of local competition, and, as discussed below, ultimately decrease the need for regulatory oversight.

B. The Commission Should Establish A Short List Of Performance Rules That Track Only The Most Competitively Significant Aspects Of ILEC Special Access Provisioning.

Most of the largest purchasers of ILEC special access, including TWTC and XO, have engaged in extensive discussions as to the most appropriate performance measurements, standards, and reporting requirements for ILEC special access. As a result of those discussions, the competitive industry has devised a consensus list of requirements (the "Proposal"). A copy of those proposed requirements was filed by a coalition of competitors (again, including TWTC and XO).[38] The Proposal focuses on the most competitively significant aspects of ILEC special access provisioning. In support of this point, the performance rules advocated through the competitive industry Proposal will provide suggested guidance to the Commission for key areas of service delivery such as ordering, provisioning, and maintenance and repair. The Proposal also includes business rule methodology for each of the metrics to be reported, and it

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[36] *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993) (citation omitted); *see also United States v. AT&T*, 1982-2 Trade Cas. (CCH) ¶ 64,980, 1982 WL 1893 at *2 n.8 (D.D.C. Aug. 23, 1982) (using benchmarking to support decision to allow RBOCs to market CPE).

[37] "SBC further asserted that the seven RBOC benchmarks provide 'an effective deterrent against even subtle attempts to abuse any advantages that might arise from the ownership of local exchange telecommunications facilities.'" *SBC/Ameritech Order* ¶ 126 (citation omitted).

[38] Letter from Joint Competitive Industry Group to Michael Powell, Chairman FCC, Attachment A, Proposed ILEC Performance Measurements and Standards in the Ordering, Provisioning, and Maintenance and Repair of Special Access Service (filed Jan. 22, 2002).

recommends performance benchmarks to help deter anticompetitive ILEC practices. The Joint Commenters urge the Commission to adopt the performance rules set forth in the Proposal.

Performance rules such as these can be adopted in this proceeding without any need to rely on industry workshops, such as those used in state Section 271 proceedings for performance measures and standards for unbundled elements and interconnection. None of the rationales that justified the use of workshops in state Section 271 proceedings appears to apply to special access. First, and perhaps most importantly, industry workshops that include the ILECs can be useful where, as in Section 271 proceedings, the ILEC has an incentive to cooperate. Yet ILECs would have no such incentive here, and it is hard to imagine how the Commission could prevent the ILECs from using workshops to delay the adoption of special access performance requirements.

Second, the states found it useful to rely on workshops because they lacked experience in establishing performance rules, and they lacked adequate knowledge of the wholesale systems that ILECs used for providing services and facilities under Section 251.[39] Yet, as is evident from the fact that competitors have reached consensus on a comprehensive and detailed list of performance rules, CLECs have no shortage of access to information regarding the critical wholesale functionalities for special access. After all, this is a service that ILECs have been

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[39] *See Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Evaluation of the New York Public Service Commission, at 3 (filed Oct. 19, 1999) (noting that the New York checklist was developed through a two year collaborative process in which experts examined every detail of Bell Atlantic's wholesale services to CLECs); *Investigation Into Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project #16251, Commission Recommendation, at 2 (adopted June 1, 1998) (recommending the establishment of a collaborative process to develop a system that addresses checklist items and performance measurements).

providing since the access tariffs were filed shortly after the divestiture of the Bell System. Carrier purchasers of special access therefore have many years of experience to rely upon in assessing their needs in terms of performance requirements. The FCC also has significant experience in reviewing ILEC special access tariffed offerings, and it has significant experience both in developing performance rules (in the merger proceedings and in the collocation proceedings) and in reviewing different state performance plans in its Section 271 proceedings.[40]

Third, workshops would impose significant costs on the industry and regulators. The FCC acknowledges that reporting requirements could unnecessarily increase the regulatory burden on the industry. NPRM ¶ 13. Industry workshops are likely to undermine that goal.

The Commission should, however, adopt procedures for the scope and frequency of ILEC special access reports that are similar to those adopted by the states in which BOCs have received Section 271 approval. For instance, currently most BOCs electronically report their monthly service delivery and maintenance performance via secured access websites on a state-by-state basis to the appropriate state commission, BOC, and competitors. This approach allows a competitor to rapidly access its own service delivery data as reported by the BOC and to compare that data to performance data for competitors in the aggregate, as well as to the BOC's service delivery performance to itself. ILECs should be similarly required to provide electronic website reports on a monthly basis for special access, and those reports should be disaggregated by state. Requiring state-by-state reporting should assist in benchmarking an ILEC's performance in one area versus another area. Each ILEC's monthly report should include

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[40] If needed, the FCC could even draw on the experience of states like Texas, Indiana, New York, or Colorado that have reviewed performance rules for special access.

information about service delivery performance provided to (1) their end user customers, (2) their affiliates, (3) unaffiliated carrier customers as a whole, and (4) each separate competitive carrier that purchases under the ILEC's special access FCC tariff offering (with appropriate confidential treatment for individual carrier reports) as recommended in the Joint Industry Proposal.[41]

While there is every reason to establish detailed rules regarding the ILECs' reporting requirements, there is no need to impose reporting requirements on CLECs. The point of performance rules is to facilitate the detection of discrimination in favor of the ILEC's end users and affiliates as well as discrimination among competitors. Accordingly, any meaningful performance requirements must include a basis for comparing the level of service quality provided to specific competitors with the service quality provided to (1) the ILEC's end users and affiliates, and (2) all competitors. Only the ILECs have access to the information needed to provide this information. Moreover, there are almost certainly economies of scale in establishing back office reporting mechanisms for ILEC end users and affiliates and competitors on the whole on the one hand and individual CLECs on the other. To require CLECs to report on performance for themselves only would therefore be inefficient. For all of these reasons, it makes no sense to impose reporting requirements on carrier purchasers of special access.

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[41] As explained in Section IV *infra*, separate reports for individual carriers are necessary for those carriers that purchase special access out of an ILEC's standard tariff offering or pursuant to an agreement that cross-references the performance rules in the ILEC tariffs because such competitors do not have competitive alternatives and thus lack the leverage to convince an ILEC to enter into a separate contract arrangement (assuming Phase II pricing flexibility has been granted and the ILEC would be allowed to enter such an agreement).

C. Failure To Meet Performance Rules Should Trigger Automatic Discounts On The Prices For The Affected Special Access Services As Well As The Automatic Initiation Of Forfeiture Proceedings.

The goal of establishing performance rules should be to diminish the ILECs' incentives to discriminate and engage in unreasonable practices. Currently, ILECs can degrade the quality of their competitors' special access without suffering any negative consequences in terms of lost customers and revenue. In a competitive market, this would not be the case. In that context, if an ILEC provided poor service quality, it would lose customers and revenues. This would give the ILEC the incentive to improve its service quality. Performance requirements should attempt to replicate this dynamic as much as possible.

Accordingly, the Commission should impose a multi-tiered system of automatic, self-enforcing financial penalties (in the form of reductions or waivers of tariffed charges) on ILECs for failure to provide special access service to their carrier competitors in accordance with the applicable performance standards described in the Proposal. Such a remedy system should allow for escalation of the financial penalties to apply to correspondingly higher degrees of service delivery infractions by the ILEC. The structure should include two tiers: one for CLEC-affecting failures and another for competition-affecting failures. It should include compensation for individual competitive carriers for service delivery infractions by the ILEC for each failure occurrence, rather than on the basis of whether the ILEC on the whole "passed" or "failed" the measure. The first tier remedy should consist of discounts on (and in some cases complete waivers of) non-recurring and recurring charges for each infraction. Tier I discounts and waivers would apply retroactively to the months for which service failed to meet the relevant standard, although additional prospective discounts and waivers should apply where an ILEC repeatedly

fails to meet standards. Likewise, a second remedy tier should apply where the ILEC has failed the overall performance threshold for all competitors in that market in a particular month. Second tier remedies could result in increased price reductions and waivers above and beyond those required under Tier I, and would apply to service purchased by all competitive carriers in a state. Again, these would apply to the affected month, but would also apply prospectively where performance continues to be poor.

Such financial penalties may increase the cost of discrimination somewhat, but they are unlikely by themselves to deter the ILECs completely. The Commission must therefore establish rules that result in the automatic initiation of a forfeiture proceeding under Section 503 (including automatic delivery of a notice of apparent liability to the ILEC) where the ILEC fails to meet the applicable performance standards.[42] The level of the forfeiture should of course be calibrated to correspond with the degree to which the ILEC has failed to meet a standard during the relevant time period and the degree to which the ILEC has missed performance requirements in the past. The Commission should refrain from imposing forfeitures in such cases only if the ILEC has missed the relevant performance standard in these cases by a statistically insignificant amount or in exigent circumstances (*e.g.*, natural disasters). The FCC can rely on automatic triggers for forfeiture proceedings by establishing mechanisms (especially periodic audits and financial penalties for failure to keep accurate data as described *infra*) that ensure that the data

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[42] 47 U.S.C. § 503. Even in the face of repeated imposition of self-enforcing financial penalties imposed by merger conditions, the ILECs continue to engage in anticompetitive conduct. The Commission has therefore sought forfeitures in addition to self-enforcing penalties. *See, e.g., SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, FCC 02-7, ¶ 6 (rel. Jan. 18, 2002) (proposing a forfeiture in the amount of $6 million for repeated violations of the SBC/Ameritech merger conditions). For similar reasons, automatic forfeiture penalties are necessary here in addition to other applicable self-enforcing penalties to deter discrimination by the ILECs.

the ILEC provides is accurate. Indeed, in this regard it is significant that it is the ILECs themselves that would provide the data used to trigger automatic forfeiture proceedings.

Special rules should also be established to address ILEC failures to comply with the reporting requirements. No obligation imposed under this regime should be viewed as more critical than reporting. If ILECs fail to report the correct kind of data or fail to report it accurately, the entire performance regime will be undermined. The Commission should therefore require that ILECs pay for an independent annual audit of their special access performance reports. The audit should include a comprehensive review of the ILECs' procedures for complying with the business reporting guidelines, such as business rules and exclusions. In addition, the auditors should review the data reported for accuracy. This can be done by reviewing the data reported during a representative time period (three consecutive months, for example) in a single state chosen at random for each of the measurements. Furthermore, a CLEC should be allowed to petition the Commission to require a special audit of data where the CLEC can make a *prima facie* case that the data for a particular measurement in a particular state is unreliable. In any case where an ILEC is found to have failed to comply with the measurement rules (*e.g.*, failed to properly apply business rules, exclusion rules, etc. set forth in a particular measurement requirement) or failed to report accurate data, the Commission should aggressively seek forfeiture penalties. Indeed, current regulation already subjects SBC and Verizon to similar audit requirements under the merger conditions. *See SBC/Ameritech Order* ¶¶ 410-412; *Bell Atlantic/GTE Order* ¶¶ 336-342.

Finally, none of these mechanisms should in any way preclude a particular carrier from bringing a separate Section 208 complaint for poor special access service quality. Even when all

of the mechanisms described herein are applied, it is still unlikely that the ILEC incentives for discrimination will disappear (especially in the case of large ILECs). It is also unlikely that any automatic financial penalties imposed on ILECs will fully compensate the carrier customers, especially where the service failure is severe. Carriers should be allowed to recover this differential in the context of a Section 208 complaint.

D. The Performance Measurements, Standards, Reporting Requirements, And Penalties Proposed Herein Should Apply Automatically Only To Class A ILECs.

The Commission has consistently relied on the Tier I classification (defined as ILECs with annual revenues of $117 million or more) as the cutoff point for determining whether a set of regulations that are otherwise in the public interest may impose undue burdens on smaller ILECs. Thus, the Commission used the Tier I cutoff point to determine whether a carrier must be required to comply with expanded interconnection requirements and the more detailed ARMIS reporting requirements.[43] In reaching these decisions, the Commission has concluded that the burden of complying with these detailed regulatory regimes for a Tier I ILEC is not significant, especially when compared to the benefits these regimes would deliver.

There is every reason to reach the same conclusion in this case. Class A ILECs have sophisticated and scalable back office systems that will allow them to make any adjustments

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[43] *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 1 (1992), *remanded on other grounds, Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (requiring Tier I LECs to provide expanded interconnection to any interested party); *Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules)*, Report and Order, 2 FCC Rcd 5770, ¶ 4 (1987) (adopting annual automated reporting requirements for Tier I carriers); *see also Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules)*, Report and Order, 60 Rad. Reg. 2d (P&F) 1111, ¶ 109 (1986) (retaining a two tiered system for accounts and financial reporting requirements under 47 C.F.R. § 32.11, where the Class A carriers are defined according to the same criteria as Tier I carriers).

needed to track the information called for in the relevant measurements and standards. Moreover, given that Class A ILECs are already required to provide ARMIS reports on special access, it should not be overly difficult to adjust the mechanisms used to provide those reports to meet the requirements established in the proceeding. Of course, given the significant size of even the smallest Class A ILEC's territory, the benefits of performance rules (as more fully explained in Section V *infra*) would far outweigh any associated burdens.

Furthermore, although the rules proposed herein should not apply to non-Class A ILECs, the Commission should allow competitors to petition the Commission to extend such regulations to the smaller ILECs. The Commission should review the costs and benefits of such a request on a case-by-case basis, taking into account, among other things, the volume of special access purchased by carrier competitors from the ILEC in question and the specific ILEC's ability to comply with the Commission's rules.

Finally, lest there be any doubt about the matter, there is no basis in either policy or the Commission's precedent for imposing performance rules on competitive carriers. As competition among common carriers was introduced in the 1970s, the Commission was forced to consider whether it would be efficient to regulate new entrants under the full set of regulations needed to constrain carriers that retained market power even in light of emerging competition. One of the Commission's early decisions regarding regulation of competitive carriers, in fact, considered whether imposing service quality performance measures and standards on new entrants would be in the public interest.[44] The Commission rejected this proposal, concluding

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[44] *See Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, Final Report and Order, 78 FCC 2d 1291 (1980).

that a "customer's ability to switch to another provider of service" gives competitive carriers a "significant incentive … to enhance their competitive position" thereby making regulation unnecessary. *Id.* ¶ 7.

Following this principle, the Commission initiated its *Competitive Carrier* proceeding to more fully assess the appropriate regulation of new entrants.[45] In the *Competitive Carrier First Report & Order*, the Commission established the dominant/non-dominant regulatory framework that remains in place today. *See Competitive Carrier First Report & Order*. The Commission approached this assessment with two basic principles in mind: (1) in order to retain customers with prices above total costs or to recoup losses from below-cost pricing, a firm must possess market power and some regulated firms did not; and (2) "regulation of business conduct imposes costs." *Id.* ¶¶ 10-11. The Commission acknowledged that "regulation sometimes creates … perverse incentives for the regulated firms." *Id.* To eliminate the costs unnecessarily imposed on competitive carriers while retaining regulations needed to constrain carriers that could exploit their market positions, the Commission established a framework under which carriers would be classified according to "their dominance or power in the marketplace" and then would "apply different regulatory rules to each."[46] Indeed, the Commission reasoned that "it would defy logic

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[45] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1980) ("*Competitive Carrier First Report & Order*"); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (vacating a Commission decision in a complaint proceeding against a non-dominant carrier for violation of the tariff requirements of the statute), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (vacating mandatory detariffing of non-dominant carriers based on the limitation on the Commission's authority to forbear from enforcing a statutory requirement).

[46] *Id.* ¶ 17; *see also id.* ¶ 33, n. 36 (concluding that this would ensure that dominant carriers "do not exploit their market power unlawfully" while "marketplace forces should be sufficient to insure that the rates of competitive

and contradict the evidence available to regulate in an identical manner carriers who differ greatly in terms of their economic resources and market strength." *Id.* ¶ 34. Finally, the Commission concluded that the assertion that "the Act requires uniform application of Title II to all carriers is simply wrong as a matter of law" and to the contrary, the Commission is "authorized and obligated to exercise its reasoned judgment in devising the types of regulatory systems most appropriate to the problems presented within its jurisdiction." *Id.* ¶ 45. As a result, the Commission has consistently applied strict regulation to dominant carriers while applying reduced regulation to competitive carriers in cases in which the Commission found that the public interest would be served by this approach.[47]

After two decades of regulating carriers only to the extent that regulation is necessary in the public interest, there is no need to reverse course by applying performance measures and standards to CLECs' special access services needlessly. As the Commission concluded in its *Competitive Carrier First Report & Order*, regulating carriers whose conduct is already disciplined by the market imposes costs and distorts incentives. Given that the ILECs are the dominant providers of special access, CLECs simply lack the incentive or opportunity to discriminate in the provision of special access. Any customer that might receive such

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non-dominant carriers are reasonable and not unjustly discriminatory."). Initially, AT&T and the independent telephone companies were found to be dominant carriers. Any carrier that had not been expressly found to be dominant would be classified as non-dominant and subject to reduced regulation. *See id.* ¶¶ 26-27. Non-dominant carriers are subject to reduced regulation, but are not fully deregulated. They remain subject to provisions of the Act including Section 201 and 202. *See id.* ¶ 46. Post-divestiture AT&T was later found to be non-dominant, but ILECs remain subject to dominant carrier regulation. *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

47 *See, e.g.*, 47 C.F.R. §§ 43.21, 43.43, 43.51 (imposing more extensive reporting and filing requirements on dominant carriers); 47 C.F.R. §§ 61.31-61.59, 65.1-65.830 (imposing price cap and rate-of-return regulation on dominant carriers); 47 C.F.R. § 63.71 (imposing different service discontinuance requirements on dominant and non-dominant carriers).

discriminatory service from a CLEC would simply switch to the ILEC, the ubiquitous alternative provider. This eliminates the need for imposing performance rules on CLECs. Finally, in light of the overwhelming ILEC dominance in this market, the costs imposed on new entrants by new performance rules clearly outweigh any potential incremental benefits associated with collection of such data.

E. The Rules Adopted In This Proceeding Should Be Reviewed At Regular Intervals.

It is important that there be a scheduled proceeding in which the Commission can revisit the rules adopted in this proceeding. For example, the Commission could review the rules every two years. In the context of that review, the Commission could revisit whether performance rules for special access continue to be necessary. Moreover, if such rules continue to be necessary (as seems likely), the Commission could review ways in which to make the special access performance rules more effective. For example, the measures proposed by the industry do not assign penalty payments to measures such as "Average Delay Days Due to Lack of Facilities (*see* JIP-SA-5)," "Percent Past Due Circuits Due to Lack of Facilities (*see* JIP-SA-7)," or "Percent Out of Service Greater Than 24 Hours (*see* JIP-SA-10)." Due to the potential impact on CLEC customers, if it is determined that the ILECs are failing to meet these measures on a regular basis then the Commission should find that these measures should no longer be diagnostic but rather should be categorized as remedy-eligible. In this regard, the Proposal will continue to be updated and modified. The Commission can incorporate such changes into its rules as appropriate during its periodic review.

IV. ADOPTION OF PERFORMANCE RULES AND SELF-ENFORCING PENALTIES IS FULLY WITHIN THE FCC'S AUTHORITY AND CONSISTENT WITH PAST FCC PRECEDENT.

The Commission has statutory authority to adopt each aspect of the regulatory regime proposed herein. There is also specific historical precedent for most of the components of the proposed regime.

The Commission has an obligation to enforce the dictates of Section 201(b), which states that "all charges, practices, classifications, and regulations for and in connection with [common carrier] service, shall be just and reasonable." 47 U.S.C. § 201(b). In addition, the Commission has an obligation to enforce the dictates of Section 202(a), which states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a).

Both Sections 201(b) and 202(a) apply here. First, Section 201(b) applies because the services in question are interstate common carrier services. That provision governs all aspects of special access, but has special relevance in this proceeding because it is the basis for establishing performance rules and penalties that govern aspects of the ILEC special access service provided to competitor carriers that have no analogue in ILEC special access service sold to non-competitor customers. Second, there can be no question that the interstate special access "services" provided to the ILECs' competitors such as TWTC and XO are, as a general matter, "like" the interstate special access "services" provided to its end users and affiliates. As mentioned, there may be some specific aspects of provisioning that ILECs perform for

competitor carriers that they do not perform for their non-competitor customers. But where retail analogues exist, Section 202(a) governs.

Because Section 201(b)'s mandate of just and reasonable charges and practices and Section 202(a)'s prohibition against unjust or unreasonable discrimination are ambiguous, Congress has implicitly delegated interpretive authority to the Commission.[48] Indeed, this ambiguity demands "the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co*., 309 U.S. 134, 138 (1940). In exercising its discretion, the Commission's interpretation need only be "reasonable and consistent with the statutory purpose and legislative history."[49]

The Commission can rely on Section 201(b) to adopt appropriate performance rules for special access functionalities provided to competitor carriers. The Commission relied on almost identical statutory language to establish provisioning standards for collocation based on the ILECs' statutory "duty to provide, on rates, terms, and conditions that are *just, reasonable,* and nondiscriminatory, for physical collocation . . . ."[50] By interpreting Section 201(a)'s parallel language to set national performance standards for interstate special access services, the

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48 47 U.S.C. §§ 201(b), 202(a); *see Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997); *Capital Network System v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Congress entrusted administration of the Communications Act … to the FCC. Section 201(b) of the Act mandates that any interstate communications charge, practice, classification, or regulation must be 'just and reasonable' and declares unlawful any that are 'unjust or unreasonable.' Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.") (citations omitted).

49 *Bell Atl. Tel. Cos.*, 131 F.3d at 1049 (citations omitted); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

50 47 U.S.C. § 251(c)(6) (emphasis added); *see Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking; Fifth Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806, ¶ 17 (2000).

Commission would be exercising its discretion in a manner that is both "reasonable and consistent with the statutory purpose and legislative history."[51]

The Commission can also rely on Section 202(a) to apply performance rules to ILEC special access functionalities for which there exist non-competitor customer analogues. In most cases, the Proposal stops short of requesting parity as the standard for special access service. But there are some cases in which it calls for parity (for example in installation intervals), and there is no doubt that the Commission has the authority to order parity under Section 202(a). Section 202(a) imposes "a heavy burden upon telecommunications carriers to justify any differential … for like services…."[52] Lawful discrimination is the exception rather than the rule; departures from nondiscrimination are justified only when necessary to serve countervailing goals in the statute.[53] The point of the "unjust and unreasonable" modifier in Section 202(a) is thus to give the Commission the flexibility to permit carriers to discriminate if and only if it deems it necessary to advance a competing statutory goal. But no such goal exists here. In the 1996 Act, Congress established the promotion of local competition as national policy. In so doing, it stated that inputs purchased by CLECs must be subject to an unqualified "nondiscrimination" standard (*i.e.*, parity). *See* 47 U.S.C. § 251(c)(2), (3). The special access circuits at issue here are used by

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51 *Bell Atl. Tel. Cos.*, 131 F.3d at 1049; *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

52 *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, ¶ 49 (1983) ("*MTS and WATS Third Report and Order*"); *see also MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Cir. 1990) ("'Perfect parity of charges is not necessary to meet the test of section 202(a), but the FCC must articulate with precision its reasons for tolerating any discrepancies it uncovers.' … It may declare the disparate charges lawful only if 'there is a neutral, rational basis underlying [the disparity]") (citations omitted).

53 *See MTS and WATS Third Report and Order* ¶ 97 ("Section 202(a) of the Communications Act does not require total equality of rates at all times or under all circumstances. The Act prohibits 'unjust or unreasonable' discrimination [and] 'undue or unreasonable preferences….' This necessarily implies that departures from total equality are permissible and may be required to achieve Communications Act goals other than the elimination of discrimination or preferences.").

CLECs to provide competitive local service. It cannot be, therefore, that any countervailing statutory goal permits the Commission to relax the nondiscrimination requirement in Section 202(a). Interpreting Section 202(a) in this manner would be "reasonable and consistent with the statutory purpose" of the 1934 Act provisions as modified by the 1996 Act.[54]

The Commission also has the authority to require that ILECs include commitments to report on their performance. Specifically, under Section 4(i) of the Communications Act, the FCC has the authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Performance reports are "necessary" to ensure that the ILECs are complying with the performance measurements and standards described above because only the ILECs have information on the level of service provided to their end users, affiliates, and competitors.

In addition, the Commission has the authority to require that ILECs discount or waive their special access offerings where they fail to meet the specified performance standards. As

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[54] *Bell Atl. Tel. Cos.*, 131 F.3d at 1049. In the *Local Competition Order*, the Commission stated that it "reject[s] for purposes of Section 251, [its] historical interpretation of 'nondiscriminatory,' which [it] interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 218 (1996). It believed that instead the term "nondiscriminatory" under Section 251 "applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself." As the Commission clearly states, its historical interpretation is a vestige of the regulated monopoly environment. In a monopoly environment, there could be no comparison made between service provided to competitor-customers and non-competitor customers, since there were no competitors. Still, Section 202(a) has always applied to all of a carrier's customers. Since those customers now include CLEC competitors, Section 202(a) applies to them. Moreover, it is also true that where competition did exist in the past, Section 202(a) applied to competitors as well as non-competitor customers of the regulated carrier. *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 FCC 2d 261, ¶ 41 (1976), *modified on recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978) (eliminating tariff restrictions on resale and sharing of private line services and facilities based in part on Section 202(a)); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 FCC 2d 167, ¶ 11 (1980) (eliminating tariff restrictions on resale and sharing of switched services and facilities based in part on Section 202(a)).

mentioned, the purpose of this requirement would be to improve an ILEC's incentives by subjecting it to the same pressures that would apply in a competitive market. The Commission has in the past established pricing regimes designed to improve ILEC incentives. For example, price caps were imposed on the BOCs and GTE (they were optional for other ILECs) as a means of giving the ILECs the incentive to function more efficiently. The Commission described the policy underlying price caps as follows:

> In designing an incentive-based system of regulation for the largest LECs, our objective, as with our price caps system for AT&T, is to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.

LEC Price Cap Order ¶ 2. Under price caps, the ILECs' profit-making incentives were harnessed by forcing them to pay the financial consequences of inefficiency that would be due in a competitive market. The price cap in most cases functioned as the maximum level the ILEC could charge without losing revenues, just as would be the case in a competitive market. Importantly, the loss of revenues is (subject to some qualifications that applied until the CALLS order) automatic. The regulators do not need to conduct a proceeding to determine whether it is permissible for an inefficient ILEC to suffer a loss in profits for a particular year (losses that, for example, could conceivably represent several percentage points of an ILEC's return on investment).[55] On the other hand, the ILEC could make more money, again as in a competitive market, by continuing to charge rates at the price cap levels while at the same time lowering costs. All of this was deemed necessary to ensure that ILECs complied with their statutory

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[55] To be sure, an ILEC that is in danger of not being able to attract capital investors or lenders would have an argument that the FCC must intervene to raise the relevant caps, and the price cap system generally accounts for this possibility. But very significant losses could theoretically be incurred before such intervention would be warranted.

obligation to provide service on just and reasonable rates, terms, and conditions under Sections 201 and 202 of the Act. *LEC Price Cap Order* ¶ 2.

Similarly, self-enforcing reductions and waivers of special access charges for failure to meet performance standards would replicate the incentives an ILEC would have in a competitive market. Just as price caps result in financial penalties (in the form of lower profits) for ILECs that do not keep their costs under control, so the reduction of or elimination of charges for special access inputs would replicate the lost revenues that would follow if the ILEC were to fail to provide an adequate level of service quality in a competitive environment. Thus, just as the Commission could establish an incentive regime to "advance the public interest goals of just, reasonable, and nondiscriminatory rates" under price caps, *id.*, so it could adopt an incentive regime here to advance the public interest goals of just, reasonable, and nondiscriminatory "practices." *See* 47 U.S.C. §§ 201(b), 202(a).

It is also important to point out that the Commission has in the past mandated discounts applicable to services when provided at low levels of quality. The Commission did just this when it required that the ILECs set the price for interconnection purchased by the so-called "other common carriers" or "OCCs" prior to the implementation of equal access at a discount of 55 percent below the price charged to AT&T.[56] The Commission did so because the quality of interconnection received by the OCCs prior to the implementation of equal access was "distinctly inferior to that received by" AT&T. *MTS & WATS Third Report and Order* ¶ 151. Moreover, the price differential for OCCs was established without regard to the cost of providing

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[56] *See MTS & WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 834, ¶ 84 (1984). This discount applied until equal access was implemented in a particular exchange. *See id.* ¶ 79.

the lower quality service to the OCCs. In enacting this requirement, the Commission relied on its authority under (among other provisions) Section 202(a) to ensure that the "charges" for interstate common carrier service were not unjustly or unreasonably discriminatory. *Id.* ¶¶ 37, 46-48, 52.

The Commission may require that the ILECs include performance measurements, standards, and self-enforcing penalties in their interstate special access tariffs. Section 205(a) of the Act states that if, "after full opportunity for hearing upon a complaint . . . the Commission shall be of the opinion that any charge . . . or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what . . . practice is or will be just, fair, and reasonable." 47 U.S.C. § 205(a). Section 403 of the Act gives the Commission the authority to initiate a proceeding, on its own motion, "as to any matter or thing . . . concerning which any question may arise under any provision of this Act." 47 U.S.C. § 403. That section goes on to state that the "Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint." *Id.* Since the level of special access quality is certainly a matter concerning whether a "question may arise" under Sections 201(b) and 202(a), the Commission may initiate a proceeding under Section 403 in which it has all the authority it would have if a complaint had been filed. Under Section 205(a), that authority includes the power to prescribe carrier practices and charges applicable if those practices are not complied with after full opportunity for hearing.

A notice and comment rulemaking proceeding is sufficient to satisfy that hearing requirement.[57] Thus, at the conclusion of this proceeding, Sections 205(a) and 403 grant the FCC the authority to require that ILECs include performance measures and standards ("practices" in the parlance of Section 205) and applicable discounts where measurements and standards are not met ("charges") in their special access tariffs.

It is also consistent with the logic of this proceeding that these requirements be placed in ILEC special access tariffs. The purpose of this proceeding is to ensure a baseline level of service quality for special access customers to prevent the ILEC from discriminating against its competitors in areas where it has substantial market power. Tariffs are the mechanism used in the Communications Act to prevent this kind of discrimination. There is therefore every reason to use tariffs to prevent non-price anticompetitive behavior. Of course, the ILECs may not possess substantial market power in the provision of special access on routes where facilities-based alternatives exist. If the ILEC has received Phase II pricing flexibility in those areas, a purchaser will be free to negotiate service quality standards that exceed those in the tariff as part of a separate contract (albeit one that must be filed as a contract tariff). Obviously, the performance rules adopted herein and incorporated into ILEC tariffs should not apply to contracts that include performance rules that differ from the tariffed performance rules.

Finally, the reporting requirements should be established pursuant to FCC regulations applicable to all special access services offered by the ILEC. This will allow for comparisons between the levels of service received by customers purchasing under the tariff and by all customers, including those purchasing under contracts. That information can in turn be used to

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57 *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 21-23 (2nd Cir. 1978).

adjust performance measurements and standards going forward to the extent needed to bring performance for tariff purchasers up to the level of all purchasers in the aggregate. Carrier-specific reports should be mandated only for those purchasing under the tariff, the class of customers protected by these regulations. Of course, those purchasing under contracts can negotiate this right as part of their agreements with the ILEC.

V. THE BENEFITS OF NATIONAL PERFORMANCE RULES AND PENALTIES FOR SPECIAL ACCESS FAR OUTWEIGH THE COSTS OF SUCH A REGIME.

There are currently no effective restraints on the ILECs' ability to act on their powerful incentives to degrade the quality of special access service provided to their competitors. Performance rules and self-enforcing penalties would significantly diminish the ILECs' incentives to discriminate and increase the effectiveness of enforcement when they do discriminate. These very significant benefits would far outweigh the limited costs of implementing and maintaining such requirements.

A. There Are Currently No Effective Regulatory Safeguards Against ILEC Service Quality Discrimination And Unjust/Unreasonable Practices In The Provision Of Special Access.

The existing regulatory scheme fails to adequately address special access provisioning problems faced by CLECs today.

1. Existing ARMIS reporting requirements are deficient.

ARMIS Report 43.05, Table 1 requires incumbent LECs to report the quality of provisioning for special access circuits on an annual basis. Table 1 reports data on six measurements.[58] There are four installation measurements: Total Number of Orders or Circuits

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[58] For an explanation of the ARMIS reporting procedures, definitions, and other relevant information, *see* FCC Report 43-05 Instructions (Dec. 2000) <http://www.fcc.gov/ccb/armis/documents/2000PDFs/4305C00.PDF>.

(row 110), Missed for Customer Reasons (row 111),[59] Percentage Commitments Met (row 112), and Average Interval (row 114), and two repair measurements: Total Trouble Reports (Row 120) and Average Interval (Row 121). These measurements suffer from serious deficiencies.

The Percentage Commitment Met (row 112) is "calculated by dividing the number of installation orders or circuits from the Interexchange carriers/customers completed by the commitment date by the total number of installation orders or circuits." The "commitment date" is in turn "based on the ILEC's installation intervals." These intervals are ostensibly published by the ILECs and kept on file with the Commission. Yet, notwithstanding repeated inquiries with the FCC and the ILECs, the Joint Commenters have been unable to obtain the applicable ARMIS intervals. Even in those instances where a CLEC has performance data for special access provided to the CLEC, without information about ARMIS row 112's installation intervals, carriers do not know whether they are comparing "apples-to-apples." Unofficial sources of intervals, such as ILEC web pages and ordering guidelines, are of little help. For example, instead of having a set interval for all high capacity special access services, these sources typically report different intervals depending on a number of factors, including the capacity of the special access circuit, the number of lines in an order, etc. Without information about the underlying mix of circuit types and orders, it is impossible to know what an ILEC's installation intervals are and thus, whether CLECs are receiving nondiscriminatory service. To further complicate matters, the instructions for Row 112 indicate that "[c]ommitment dates may be extended at the customer's request." Again, it is not clear whether or how these extended dates

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[59] Row 110 reports the number of orders completed during the current reporting period, but excludes those orders not completed because the customer was not ready, which are reported in Row 111.

are reported. In Joint Commenters' experience, as discussed in more detail below, the lack of transparency in ARMIS reporting makes it easier for the ILECs to mask discriminatory special access service quality.

Other installation measurements suffer from deficiencies of their own. As noted, Row 110 and Row 111 measure the total number of installation orders completed by the commitment date, with those missed for customer reasons reported in Row 111. The instructions for Row 111 in turn indicate that "missed for customer reasons" includes, *but is not limited to* "the following situations: 1) customer not ready, 2) customer requested later date, 3) premises not ready, 4) customer not prepared to test, 5) no access to premises." The breadth of this language makes it difficult for CLECs to determine with certainty how an order has been classified. Nor is there any effort to make such business rules consistent across the ILECs. Again, in those limited instances where a CLEC is able to obtain performance data for itself, there is no way to be certain that those reports calculate performance data consistently with ARMIS. Because Row 110 is the denominator for Row 112, this shortcoming taints Row 112 as well.

The Average Interval (row 114) is equally problematic. Row 114 measures the "average interval . . . between the date the service order . . . was placed and the date the service order was completed." Although it measures what should be a straightforward provisioning interval, its definitions are unclear. For example, what is the date the order was placed? Is it when the order was submitted? When a firm order confirmation is returned to the CLEC? What about orders that are placed in "pending facilities" status? Without additional information as to how these terms are interpreted by the ILECs, carriers cannot determine whether they are receiving inferior service.

The ARMIS repair and maintenance measurements are also of limited utility in their current form. Row 120 reports the total number of trouble reports referred to the ILEC during the reporting period. Even this seemingly transparent measurement is vulnerable to gamesmanship. In fact, as noted in the NARUC White Paper, different carriers have different internal business rules that dictate whether a call into the repair center is reported as a "trouble."[60] "One carrier may have a list of twenty or more reasons for excluding a trouble ticket from the report, while another utility may have only two or three acceptable exceptions." *Id.* Not surprisingly, state commissions "have encountered significant discrepancies in the exceptions found in audits of telecommunications carriers." *Id.*

The Average Interval (row 121) for maintenance and repair also raises troubling issues. Row 121 measures the "average interval, in hours to the nearest tenth based on a stopped clock, from the time of the reporting carrier's receipt of the trouble report to the time of acceptance by the complaining carrier/customer. This interval is defined as 'Interval measured in clock hours, excluding only time when maintenance is delayed due to circumstances beyond the ILEC's control. Typical reasons for delay include, but are not limited to, premise access when a problem is isolated to the location or to absence of customer support to test facilities.'" These broad definitions make it difficult to determine when the interval clock is "stopped" due to "circumstances beyond the ILEC's control."[61] Absent a clear definition of what constitutes "circumstances beyond the ILEC's control," it is nearly impossible to understand how row 121

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[60] *See 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements*, Notice of Proposed Rulemaking, 15 FCC Rcd 22113, Appendix C at 22138 (2000).

[61] *See, e.g.*, Comments of The Public Utilities Commission of Ohio at 3-4, filed in CC Dkt. No. 00-229 (Jan. 11, 2001); Comments of The Florida Public Service Commission at 3, filed in CC Dkt. No. 00-229 (Jan. 8, 2001).

compares to similar carrier-specific service intervals, or how it compares across ILECs, who might define circumstances beyond their control differently.

Even if the ARMIS reports were perfectly transparent, other aspects of ARMIS further limit the reports' value for monitoring and detecting discriminatory provisioning of special access by the ILECs. First, the ARMIS data applies only to IXCs, not to CLECs. Second, ARMIS does not report carrier-specific data. Without carrier-specific data -- both CLEC and ILEC -- there is no way to determine whether CLECs are being treated at parity for those wholesale functions for which the ILEC has a retail analog. Third, ILECs are only required to file ARMIS on an annual basis, yet customers focus on performance over a much shorter timeframe, *i.e.*, from month-to-month.[62] This long lag time shields any discriminatory or unjust provisioning from detection until long after any effective remedy can be imposed. Fourth, ARMIS data is not audited and is thus of questionable reliability. Thus, in its current form, there can be little doubt that ARMIS is inadequate to safeguard against ILEC discrimination in the provision of special access.

2. ILEC tariffs generally do not include performance measurements and ILECs currently are not even required to include standard intervals in their tariffs.

ILEC tariffs generally do not contain binding performance measurements, reporting requirements, or penalties. Some ILECs do include "service installation guarantees," or refunds, in their tariffs if provisioning does not occur within a specified interval. However, because the ILECs are not required to include service intervals in their tariffs, these guarantees in fact do

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[62] As discussed below, SBC/Ameritech and Bell Atlantic/GTE are required to report ARMIS on a quarterly basis as a result of commitments made during their respective mergers. *See SBC/Ameritech Order*, Appendix C, ¶ 63; *Bell Atlantic/GTE Order*, Appendix D, ¶ 52.

little to remedy service quality problems. These minimal requirements are insufficient to ensure that the ILECs will provide CLECs reasonable and nondiscriminatory service for a number of reasons.

First, service installation guarantees are meaningless unless the ILEC is bound to a standard service interval governing imposition of the guarantee. Because they are not required to include standard intervals in their tariffs,[63] it does not appear that the ILECs are bound by these intervals. (Indeed, the Joint Commenters have had trouble even determining what the governing interval for a particular service is.) Even if the intervals are binding, TWTC, XO, and other CLECs have no recourse if the ILECs alter those intervals or otherwise modify their current interval assignment systems. Nor is any of this subject to Commission review or approval.

Second, these intervals generally do not govern orders that are pending while facilities are being constructed. For these orders, no interval, and thus no performance criteria, apply. Nor is this exception insignificant. In TWTC's experience, the percentage of orders in this category can be 20 percent or higher. This exclusion effectively relieves the ILECs of *any obligation* to provide pending facilities circuits *at any time* under their current tariffs.

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[63] During its investigation of the ILECs' tariff provisions, the Commission initially *required* that the tariff itself include a "schedule indicating the length of time necessary to order access facilities. All types of access facilities offered under the access tariff should be included in this schedule. In addition, the schedule should include justification for the length of time required to provide all of these facilities." *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 97 F.C.C. 2d 1082, Appendix D at 1216 (1984). In so ruling, the Commission noted that omission of "the schedule of standard ordering intervals gives telcos considerable discretion to determine when they will or will not provide service to their customers." *Id.* "Such discretion could be exercised to favor certain carriers or, . . . if facilities are scarce, to allocate them unfairly." *Id.* The Commission further held that "omission of this schedule results in the telcos' customers being given inadequate advance notice of the length of time necessary to order particular facilities." *Id.* Nonetheless, faced with ILEC arguments that requiring them to include service intervals in the tariff would result in schedules that would be voluminous and change frequently, the FCC allowed the ILECs to omit their standard interval schedules from the tariffs and instead incorporate them by cross-reference. *See Annual 1985 Access Tariff Filings, Memorandum Opinion and Order*, 2 FCC Rcd 1416, ¶¶ 137, 150 (1987). As a result, ILECs are today able to cross-reference their standard intervals, rather than include them in their tariffs.

Third, ILECs dictate what performance measurements, if any, they include in their tariffs. Thus, many performance measurements that are critical to detecting and deterring discriminatory provisioning and repair of special access, such as those proposed by the Joint Commenters here, are excluded, subject to myriad exceptions, or do not trigger penalties. Thus, current tariff service quality requirements, to the extent they exist at all, are utterly inadequate.

3. Due to ILEC challenges, there is some uncertainty as to whether states have the authority to address this issue.

Historically, the Commission regulates interstate services and the states regulate intrastate services. Most access services, even if they are predominantly intrastate, are ordered from and governed by federal tariffs.[64] Where, as here, the service involves facilities that are used to offer both interstate and intrastate services, however, the jurisdictional issues become more complex.[65] To date, states have been hesitant to exercise jurisdiction over interstate special access facilities ordered out of federal tariffs, despite the fact that some portion of those services is intrastate.[66]

Regardless of the substantive merits, any decision by a state commission to impose requirements on interstate special access services would engender years of litigation. The resulting level of uncertainty would chill CLEC reliance on any performance measurements or standards. As Chairman Powell has recognized: "There is no greater threat to an entrepreneur,

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64 *See* AT&T Petition for Rulemaking at 23 ("In Massachusetts, for example, an overwhelming 99.4% of Verizon's special access services are provisioned under federal tariffs.").

65 *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (states and FCC have concurrent jurisdiction to regulate mixed-use facilities); 47 U.S.C. § 261(c) ("Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of [exchange services], as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.").

66 AT&T Petition for Rulemaking at 23-24. On May 22, 2001, the Chairman of the New York PSC "request[ed] that the Commission delegate authority to the state to adopt performance standards for interstate service." *Id*. at 24 n.57 (citing to Letter from Chairman Maureen O. Helmer, NY PSC, to Chairman Michael K. Powell, FCC (May 22, 2001)).

or any business, than uncertainty. A key government decision that hangs in suspended animation will kill the best-laid business plan."[67] During this period of uncertainty, CLECs would be faced with the potential for patchwork regulation (or, in many cases, none at all) governing interstate special access services from state to state. Piecemeal implementation would likely cause service quality to vary dramatically between those states without reporting requirements and those with such requirements. ILECs would also have an incentive to discriminate against CLECs in those states without service quality reporting plans and to instead focus their resources on those states with reporting requirements and penalties. Even assuming that the states have the authority to regulate interstate special access services, a nationwide, minimal level of performance measurements, standards, and penalties is clearly preferable to piecemeal implementation by the states.

B. In The Absence of Safeguards, CLECs And Regulators Are Unable To Assess Whether ILEC Performance In The Provision Of Special Access Complies With The Statutory Requirements In Sections 201(b) and 202(a).

TWTC's experience in attempting to seek regulatory intervention to address what, by all indications, was BellSouth's very poor special access service quality, demonstrates that meaningful oversight of ILEC special access service quality is highly unlikely under the existing rules. Almost one year ago, TWTC filed a letter seeking acceptance onto the accelerated docket of a dispute regarding special access service quality with BellSouth Telecommunications, Inc. ("BellSouth"). In its letter (and subsequent submissions in the proceeding), TWTC submitted evidence that BellSouth's installation intervals for TWTC were significantly longer than

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[67] Remarks of FCC Chairman Michael K. Powell at ALTS, at 2 (Nov. 30, 2001) <http://www.fcc.gov/Speeches/Powell/2001/spmkp111.pdf> ("Powell ALTS Remarks").

BellSouth's internal benchmarks for these intervals. BellSouth's intervals for TWTC were also inexplicably lengthy when compared to the average ARMIS intervals reported by BellSouth and by other ILECs. BellSouth's practice of providing TWTC what appeared to be inferior service disadvantaged TWTC *vis a vis* other competing carriers, and seemed to constitute an unjust and unreasonably discriminatory practice. Even so, the Commission declined to include TWTC's request in the accelerated docket.

Since at least 1999, TWTC has received monthly reports on BellSouth's ordering and provisioning performance.[68] According to the BellSouth data for 1999 and for January through September 2000,[69] BellSouth failed to meet TWTC's customer desired due date ("CDDD") roughly one-quarter of the time for special access. In September 2000, BellSouth indicated that its internal benchmark for DS1 and DS3 circuits was 90% on-time performance. Thus, according to BellSouth's own data, it had not apparently met its own internal service interval (which by definition is what BellSouth considers to be a reasonable benchmark). ARMIS Report 43-05, Row 112 further indicated that BellSouth has provisioned special access circuits to TWTC on unreasonably discriminatory terms and conditions. In 1999, BellSouth on average region wide met over 85% of its committed due dates, while it met only 76% of those dates for TWTC. Other ILECs' recent provisioning intervals, as reported in ARMIS Report 43-05, Row

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[68] This verbal commitment is completely voluntary and at BellSouth's discretion. Not only is TWTC unable to obtain enforceable performance reporting commitments from the incumbent LECs (including BellSouth), it has also experienced problems with unilateral modifications to the substance of these reports from month-to-month, without explanation or justification. Oftentimes these changes result in previously poor performance reported on one basis being miraculously transformed into superior performance based on another criterion.

[69] CDDD is the date by which TWTC seeks to have BellSouth's portion of the service operational and is particularly critical because the installation date that TWTC provides to its end user customers is based upon the assumption that BellSouth will meet TWTC's CDDD. In October 2000, BellSouth inexplicably (and unilaterally) reformatted its special access performance reports to replace percentage met CDDD with percentage met "Committed Due Dates," or CDD. Thus, TWTC has data for percentage met CDDD only through September 2000.

112, percentage "Commitments Met," further underscored the apparent unreasonableness of BellSouth's performance, which was roughly nine to 22 percentage points below the level of service reported by other ILECs.

In addition to its failure to meet TWTC's CDDD, BellSouth also failed to provide TWTC timely documentation regarding the status of its orders. According to BellSouth's *Guide to Interconnection* and other oral and written representations, BellSouth is obligated to provide TWTC with a firm order confirmation ("FOC") within 48 hours of receiving a clean ASR.[70] The service, or committed, due date for delivery of the services ordered is the most significant element of the FOC. At the time that TWTC filed its accelerated docket request, BellSouth did not report performance data for on-time delivery of FOCs.[71] Even so, it had been TWTC's experience that BellSouth consistently failed to provide FOCs within 48 hours. For the vast majority of orders, TWTC's records revealed that it would receive a Preliminary Order Confirmation ("POC") within three business days of BellSouth's acceptance of the ASR, and a FOC or a Pending Facilities ("PF") status assignment within *five business days* of BellSouth's acceptance of an ASR.[72] To further complicate matters, in many instances, even though

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[70] *See Guide to Interconnection* at § 1.2 (Aug. 2001) (Issue 9f) <http://www.interconnection.bellsouth.com/guides/leo/html/gctic001/indexf.htm>.

[71] Later reports did include a measurement of percentage FOCs returned within 48, 72, 96, and 120 hours, as well as an Average FOC interval. TWTC first received this report for November 2000, when BellSouth returned barely half (51%) of TWTC FOCs within 48 hours. The average FOC interval was 140 hours. December 2000 was not significantly improved, as BellSouth returned only 57% of TWTC FOCs with 48 hours, and had an average FOC interval of 132 hours.

[72] A PF status indicates that BellSouth does not have facilities in place to provide the service or that existing facilities are inoperable due to the need for repair. BellSouth provides an explanation to TWTC for why an order is in PF status if -- *and only if* -- TWTC specifically requests further information on the order. Even then, BellSouth typically takes approximately three to five business days to provide any additional information.

BellSouth had already issued a FOC with a committed due date, it would subsequently move an order to PF status -- oftentimes *on the due date or the day before the due date.*

Ultimately, the Enforcement Bureau declined to place TWTC's complaint on the accelerated docket. As always, Commission staff indicated that this determination had no bearing on TWTC's ability to file a formal Section 208 complaint. Even so, the absence of reliable performance data, reporting requirements, binding standard intervals, and applicable penalties prevented TWTC from documenting its position and obtaining any regulatory relief. As a result of these evidentiary hurdles, TWTC began to pursue FCC rules requiring service quality measures and reporting for special access.

Finally, TWTC's experience, as detailed above, completely belies the Commission's findings in the *Non-Accounting Safeguards Order* that performance measurements for special access are not necessary. First, contrary to the Commission's findings in that proceeding, existing statutory requirements do not provide sufficient protections. The ILECs are not bound to provide special access within a set interval. CLECs are unable to detect discrimination because there are no reliable and transparent benchmarks against which to gauge service quality. Second, CLECs have not been able to negotiate binding performance measurements. TWTC has repeatedly attempted to do so, yet the ILECs have steadfastly refused. Absent a regulatory requirement, the ILECs have no incentive, and in fact, every disincentive, to provide reporting. Third, even within an enforcement proceeding, TWTC was unable to obtain verifiable, transparent data regarding provisioning of its special access services. Indeed, TWTC could not even obtain an adequate explanation of what the ILEC's duties, if any, were. Not one of the

reasons supporting the Commission's decision not to adopt performance measurements in 1996 applies to the special access market today.

C. Performance Measurements, Standards, Reporting Requirements, and Penalties Will Improve Regulation And Increase The Likelihood That Competition Will Continue To Develop.

As explained above, performance measures, standards, reporting requirements, and self-enforcing refund penalties are by far the most appropriate means of limiting the ILECs' incentives and opportunities to discriminate in the provision of special access to their competitors. Adoption of a plan similar to the one described herein would fill what is, as demonstrated, a major gap in the Commission's regulations. Discrimination would become less profitable and therefore less likely. Moreover, to the extent ILECs do discriminate, measurements would make enforcement action more likely and less costly. Regulators would have a ready basis for determining whether a carrier has complied with the requirements of Section 202(a), because of the specific performance standards. Expedited enforcement would also be possible because of reliable and uniform data reported by the ILECs.

Perhaps most importantly, improved special access provisioning would increase the likelihood that competition will continue to develop. It bears repeating that, given the nature of the ILECs' legal obligation to provide UNEs (which excludes any obligation to combine UNEs not currently combined and apparently excludes any obligation to construct new facilities), *special access is and will likely remain the only means of obtaining high-capacity loops and loop-transport combinations at wholesale*. No matter how efficiently the ILECs provide UNEs, those offerings will not be sufficient unless the legal definition of UNEs changes. Competition

that relies on high-capacity end user circuits therefore can only be advanced if special access performance rules are adopted.

And advance it will. If special access inputs are provided on reasonable terms and conditions, competitive carriers like TWTC and XO can continue to increase market share, develop scale and scope economies, and invest in more facilities. Such scale and scope economies will make further construction of facilities efficient, thus advancing the critical cause of increased facilities-based competition. The dynamic efficiencies that such increased competition will deliver over time in terms of lower costs and increased innovation are likely to be very substantial.

In addition, national performance rules will provide clarity to the ILECs. The ILECs may well meet the standards of reasonableness and nondiscrimination more often if bright line rules are established to give meaning to those standards.

D. Adoption Of Performance Requirements Will Also Not Impose Significant New Burdens Either On Regulators Or On The Industry.

Nor will the regulatory requirements proposed herein impose significant new costs on the ILECs. To begin with, adoption of such requirements will allow for the elimination of some existing regulation. At a minimum, certain ARMIS reporting requirements, including the quarterly requirements set forth in the merger conditions, will become unnecessary. For example, ILECs will not have to file the ARMIS Report 43-05 Table 1 performance measurements described earlier. In addition, the Commission could eliminate certain reporting requirements adopted in the SBC/Ameritech and Bell Atlantic/GTE merger orders based on a finding that the new reporting requirements promote the public interest. For example, both SBC/Ameritech and Bell Atlantic/GTE (now Verizon) are required to report ARMIS Report 43-

05 Table 1 on a quarterly basis.[73] In addition, Verizon must report disaggregated, company-specific data for the percentage of commitments met, the average installation interval, the average repair interval, the trouble report rate, and the average delay days due to lack of facilities. *Bell Atlantic/GTE Order*, Appendix D, ¶ 53. Each of these reporting requirements could be eliminated as duplicative and unnecessary if the Commission were to adopt performance requirements.

In addition to allowing the Commission to eliminate certain existing reporting requirements, adoption of service quality reporting requirements will not unduly burden either the Commission or the ILECs. In prior proceedings involving heightened discriminatory incentives, the Commission has stressed the importance of self-enforced compliance programs aimed at detecting potential noncompliance. *See, e.g., SBC/Ameritech Order* ¶ 409; *New York Order* ¶ 433. Where, as here, self-executing penalties are included in the ILECs' tariffs, enforcement will be streamlined. When an ILEC misses a performance benchmark or parity standard by a statistically significant amount, penalties will be triggered and automatically remitted to the CLEC in the form of refunded rates. As a result, the Commission will need to expend a minimal amount of resources overseeing compliance.[74] Nor will significant regulatory uncertainty exist, because, as discussed earlier, the Commission has clear authority to establish

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[73] *SBC/Ameritech Order*, Appendix C, ¶ 63; *Bell Atlantic/GTE Order*, Appendix D, ¶ 52. These requirements sunset 36 months from the respective merger closing dates. *SBC/Ameritech Order*, Appendix C, ¶ 74; *Bell Atlantic/GTE Order*, Appendix D, ¶ 64.

[74] *See supra* Section III.

national rules and penalties in tariffs.[75] The self-executing nature of the penalties further limits any delay that might arise from extensive litigation of potential violations.[76]

These measurements are also consistent with the Commission's desire to rely on heightened enforcement to ensure competition.[77] Without precise measurements governed by clearly defined benchmarks and penalty triggers, competitors will continue to face difficulties in detecting and proving discriminatory provisioning. *See, e.g.*, Schwartz Paper at 267-68. This will hobble enforcement efforts. Indeed, the Commission has previously concluded that performance measurements decrease "the need for regulatory oversight by encouraging self-policing among carriers" and increasing the incentive for ILECs to comply with the Act's requirements.[78]

More effective regulation in the short term will also make it more likely that regulation can be eliminated or significantly scaled back in the future. Although anticompetitive behavior cannot be eliminated entirely, "[r]egulation fares much better in a mature, stable environment where information is reasonably symmetric." Schwartz Paper at 271. For example, industry experts have concluded that conditioning BOC long distance approval on implementation of key market-opening measures (which have included adoption of performance measurements)

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[75] *See supra* Section IV; *see also* Powell ALTS Remarks at 2 (expressing concern that the FCC not get tied up in appeals that force it to do things twice).

[76] *See SBC/Ameritech Order* ¶ 414; *see also New York Order* ¶ 433 (recognizing importance of a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal).

[77] *See, e.g.*, Powell ALTS Remarks at 3-4 (acknowledging that enforcement is a "cornerstone" of the FCC's competition policy); Forrester Research Telecom Forum, Q & A with Chairman Powell (May 21, 2001) <http://ftp.fcc.gov/Speeches/Powell/2001/spmkp103.html> (discussing need for increased penalties and meaningful enforcement); *see also* AT&T Petition at 25 ("In fact, the Chairman has asked Congress for increased enforcement authority, including increased monetary penalties, in order to pursue 'vigorous enforcement.'").

[78] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd 12817, ¶¶ 14-16 (1998).

"greatly reduces the need for later intrusive regulation to pry open local markets post BOC entry, once BOC incentives will have significantly worsened. In a fundamental sense, therefore, the policy of conditioning BOC entry on the prior opening of local markets is pro-competitive and deregulatory." *Id.* at 286.

This analysis is equally applicable to the access market. As the BOCs enter the market for in-region, interLATA services, their incentives to discriminate against competitors such as TWTC and XO will worsen. Implementation of performance reporting requirements that measure the most critical wholesale functionalities for special access will improve the ILECs' incentives to cooperate and will lessen the need for future regulation. Thus, adoption of the reporting requirements advocated by TWTC and XO will ultimately prove procompetitive and deregulatory.

Finally, as mentioned, imposing new reporting requirements on Class A ILECs will not impose significant costs on those carriers. After all, they are already subject to some, albeit, ineffective, special access reporting. The incremental additions of further reporting would not be significant. The only possibly significant incremental cost would be caused by adjusting ILEC billing systems to refund charges for poor service. However, given the critical role of such refund penalties, that cost should not be great enough to give the regulators pause in this instance.

VI. CONCLUSION

The Commission should adopt performance rules and self-enforcing penalties applicable to special access services provided by Class A ILECs in the manner described herein.

Respectfully submitted,

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